Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

DR. FREDERICK D. HARRIS, ET AL.,

Petitioners,

v.

ELAINE LISTON, ET AL.,
[JACKSON ROAD COMPANY]

Respondent.

On Petition for Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether denial of petitioners' right to pursue a negligence claim against a real estate developer violates petitioners' right not to be deprived of an interest in property without due process of law guaranteed by the United States Constitution.

2. Whether public policy interests warrant the creation of a federal rule clarifying the duty of care owed by a real estate developer to subsequent purchasers in designing and making improvements to land in a workmanlike manner.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS OF THIS CASE 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3
ARTICLE IV 3
AMENDMENT XIV 3

STATEMENT OF THE CASE 5
Factual History 5
Proceedings Below 6

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 10

APPENDIX
Judgment Entry of 8/25/99, Supreme Court of Ohio.....1a
Opinion of 8/25/99, Supreme Court of Ohio.....3a
Reconsideration Entry of 10/20/99.....12a

TABLE OF AUTHORITIES

CASES

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). 7
Brennanman v. R.M.I. Co., 70 Ohio St.3d at 466 (1994); 7
Burgess v. Eli Lilly & Co., 66 Ohio St.3d 59 (1993) 7
Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) 8
Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 28 S. Ct. 34, 52 L.Ed. 143 (1907) 7
Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984) 8
Hardy v. Vermeulen, 32 Ohio St.3d 45 (1987) 7
Hebert v. Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926) 7
San Fransisco Real Estate Investors v. J.A. Jones Construction Co., 524 F. Supp. 768 (S.D. Ohio 1981) 8

STATUTES

28 U.S.C. §2104 2

CONSTITUTIONAL PROVISIONS

Section 16, Article I of the Ohio Constitution 7
U.S. CONST. amend. XIV 3, 7, 8
U.S. CONST. art. IV, §2, cl. 1 ..... 3, 8

CITATIONS OF THIS CASE

The citations of the opinions entered in this case are as follows:

Judgment entered November 20, 1996 in Cuyahoga County Court of Common Pleas, Case No. CV-260392.

Journal Entry and Opinion of April 17, 1998 in the Eight District Court of Appeals of Ohio, Cuyahoga County, Case No. 72244.

Judgment Entry of August 25, 1999 from the Supreme Court of Ohio, Case No. 98-1338.

Reconsideration Entry denying motion for reconsideration in Case No. 98-1338 in the Ohio Supreme Court entered October 20, 1999.

STATEMENT OF JURISDICTION

The Order for which a writ of certiorari is sought was entered by the Ohio Supreme Court on October 20, 1999. The provisions of 28 U.S.C. §2104 confirm jurisdiction.

CONSTITUTIONAL PROVISIONS

Reliance is placed upon the provisions of the Privileges and Immunities Clause contained in Article IV, Section 2, Clause 1 and Fourteenth Amendment to the Constitution of the United States which are as follows:

ARTICLE IV

SECTION 2, CLAUSE 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for

President and Vice- President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such States, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim of the loss or emancipation

of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Factual History

On February 22, 1992, petitioners purchased from Martin and Elaine Liston a seven-year-old home located in Moreland Hills, Ohio. After purchasing the home, petitioners became aware of a problem with water ponding on the property. Petitioners had viewed the property before their purchase, but at the time they viewed the property it was snow-covered. Therefore petitioners had been unaware that a water problem existed at the time of purchase.

Upon discovery of this latent defect, petitioners investigated the cause of the standing water in their backyard. They retained an engineer who determined that the standing water was caused by the runoff from other lots in the development. The engineer informed petitioners that the developer, Jackson Road Company ("Jackson"), was negligent in the design and construction of the development's storm water runoff system.

The petitioners sought redress from Jackson. The claims against Jackson were predicated on negligence. Petitioners asserted that Jackson had been negligent in failing to design and construct an adequate water-management system for the subdivision and that Jackson's negligence had created a nuisance.

Proceedings Below

On October 28, 1993 Petitioners filed a complaint in the Cuyahoga County Court of Common Pleas, naming Jackson as one of the defendants.

On November 20, 1996, the trial court, without explanation, granted summary judgment in favor of the developer, Jackson. Then on August 25, 1999 the Ohio Supreme Court upheld summary judgment in favor of Jackson based upon reasoning that the statute of limitations on Petitioner's claims had expired three years prior to their purchase of the land. A Motion for Reconsideration was denied by the Ohio Supreme Court on October 20, 1999.

REASONS FOR GRANTING THE WRIT

The due process clause in the Fourteenth Amendment of the United States Constitution requires state action to be consistent with the fundamental principles of liberty and justice. *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926). One such fundamental principle of liberty and justice is the right for individuals to have access to courts to seek redress for their injuries. This Court has found support for the right to access to courts in the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 28 S. Ct. 34, 52 L.Ed. 143 (1907); and *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). In theory, the Ohio Supreme Court has protected this fundamental interest on numerous occasions by holding that Section 16, Article I of the Ohio Constitution guarantees reasonable time to pursue causes of action once they know of their injuries. *See Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59 (1993); *Brennanman v. R.M.I. Co.*, 70 Ohio St.3d at 466 (1994); and *Hardy v. Vermeulen*, 32 Ohio St.3d 45 (1987).

In this case, however, Petitioners have been denied the right to seek relief for their injuries. Obviously, petitioner's had no standing to sue the negligent real estate developer for latent property damage before they owned the property. More, they

had no interest in determining if a problem existed. This all changed when petitioners purchased the property and soon thereafter became aware of Jackson's negligence. But even though harmed they have been denied relief against the person who created the problem. They have been denied the right to sue on the grounds that their claim is time-barred. Such unreasonable and arbitrary logic serves no purpose other than to violate the petitioners' rights as guaranteed under the United States Constitution. U.S. CONST. art. IV, §2, cl. 1; U.S. CONST. amend. XIV.

While the purpose of a statute of limitation is to provide prospective defendants certainty in their lives by preventing the litigation of stale claims, to deny petitioners any opportunity to obtain relief is unreasonable and constitutes as denial of their property interest without due process of law. The decision of the Ohio Supreme Court necessarily means that if developers can build well enough to slip a defect past the first purchaser, they are literally home free.

As to the second basis for the issuance of the writ, the right of subsequent purchasers to seek recovery from real estate developers for defects in land resulting from negligence is a nationally disputed issue. *See Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324 (10th Cir. 1984) (*stating developer with control over design and construction owe a duty of care to subsequent purchasers in the exercise of that control*); *San Fransisco Real Estate Investors v. J.A. Jones Construction Co.,* 524 F. Supp. 768 (S.D. Ohio 1981) (*establishing that no action based on negligent construction will lie against a builder on behalf of a*

subsequent purchaser). It is against public interest and public policy to permit real estate developers to evade responsibility for their negligent workmanship simply because the injured party is a subsequent purchaser. This Court recognized the strong public policy interest in deterring negligent conduct in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Therefore, in addition to violating the Petitioner's rights, the holding of the Ohio Supreme Court violates national public policy.

There is a need for the creation of a federal common law rule which would serve to protect subsequent purchasers by clarifying the duty of care owed by real estate developers. Accordingly, if this Court would render its opinion as to the duty of care owed by a real estate developer to a subsequent purchaser, it would affirm the public interest and public policy behind deterring negligent conduct and promote the development of the law on a national basis.

CONCLUSION

There are substantial Constitutional and public policy interests at issue in this case. Accordingly, petitioners request that the Court grant this petition for review.

Respectfully submitted,

_____

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THE SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

1999 Term

Dr. Frederick D. Harris, et al., Apellees,	:	Case No. 98-1338
v.	:	JUDGMENT ENTRY
Elain Liston et al.	:	
[Jackson Road Company, Appellant.]	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal form the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellees its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

COSTS:

Docket Fee, $40.00, paid by Weston, Hurd, Fallon, Paisley & Howley, L.L. P.

(Cuyahoga County Court of Appeals; No. 7224)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1999 Term

Dr. Frederick D. Harris, et al., Apellees,	:	Case No. 98-1338
v.	:	OPINION
Elain Liston et al..	:	
[Jackson Road Company, Appellant.]	:	APPEAL FROM THE COURT OF APPEALS

(No. 98-1338-- Submitted May 26, 1999-- Decided August 25, 1999.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 72244.

This appeal arises from the purchase of a home located at 55 East Juniper Lane, Moreland Hills, Ohio. In 1984, appellant Jackson Road Company ("Jackson") conveyed Sublot 3 in Jackson Road Subdivision No. 1 (now 55 East Juniper Lane) to Kenneth J. Fisher. At the time of the conveyance, the lot was undeveloped except for the construction and paving of East Juniper Lane and the construction of utility lines and sewer and water mains in the subdivision. The development work had been completed by

independent contractors for Jackson, and it had been inspected and approved by the appropriate Moreland Hills agents.

The lot was eventually purchased by Elaine Liston. In 1985, Elaine and her husband constructed an approximately six-thousand-square-foot home on the lot. From the time the Listons moved into the home in 1985 they were aware that a "water situation" existed on the property. Drainage tiles were installed by the Listons, and, during certain times of the year, there was standing water on the real property.

Thereafter, in 1992, appellees Dr. Frederick D. Harris and his wife, Bernice, purchased the home. After purchasing the home, appellees became aware of the standing-water problem, and they also noticed that numerous problems existed with the home itself. According to Dr. Harris, prior to the purchase, he had viewed the yard when it was snow-covered, and, consequently, he had not been aware, nor had he been informed, that water problems existed. In a letter dated August 12, 1992, Dr. Harris notified the Listons of the problems associated with the home and the yard, and he requested that they contact him for a "mutual and amicable resolution." In a written response, Elaine discussed the problems outlined by Dr. Harris and stated that they were not her responsibility.

On October 28, 1993, appellees filed a complaint in the Cuyahoga County Court of Common Pleas, naming as defendants the Listons, Jackson, and others. The claims against Jackson were predicated on negligence. Appellees claimed that Jackson had been negligent in failing to design and construct an adequate water-management system for the

subdivision and that Jackson's negligence had created a nuisance.

Subsequently, appellees entered into settlement agreements with, and/or dismissed claims against, many of the defendants. Also, on November 20, 1996, the trial court, without explanation, granted summary judgment in favor of Jackson and others. The case then proceeded to trial against the Listons.

The jury returned a verdict in favor of appellees for breach of contract and for fraud. Thereafter, with respect to the finding of fraud, the trial court granted a motion by the Listons for judgment notwithstanding the verdict. The court ultimately entered judgment in favor of appellees and against the Listons in the amount of $319,000 plus costs.

Appellees appealed to the Eighth District Court of Appeals, claiming that the trial court erred in granting the Listons' motion for judgment notwithstanding the verdict and that the court erred in granting summary judgment in favor of Jackson. In addition, the Listons filed a cross-appeal. Subsequently, appellees and the Listons entered into a settlement agreement. Thus, the only issue before the court of appeals was whether the trial court erred in granting summary judgment in favor of Jackson.

The court of appeals affirmed the judgment of the trial court in part, reversed it in part, and remanded the cause for further proceedings. Specifically, the court of appeals held that appellees' negligence claims against Jackson had been timely filed within the four-year statute of limitations period set forth in R.C. 2305.09(D) and that genuine issues of material fact existed with respect to "whether the design and

implementation of the subdivision's excess water management system [were] inadequate, whether that system, or lack of it, proximately caused the problem complained of, and whether the annoyance and inconvenience of the accumulated water in the Harrises' backyard after a heavy rain or snow melt [are] of such a magnitude as to constitute a nuisance."

The cause is now before this court upon the allowance of a discretionary appeal.

Linton & Hirshman and Robert F. Linton, Jr.; Janis L. Small, for appellees.
Weston, Hurd, Fallon, Paisley & Howley, L.L.P., Forrest Norman III and William H. Baughman, Jr., for appellant.

DOUGLAS, J. Appellees' negligence claims against Jackson are governed by R.C. 2305.09(D), which sets forth a general limitations period for tort actions not specifically covered by other statutory sections. Specifically, R.C. 2305.09(D) requires that claims predicated on damage to real property "be brought within four years after the cause thereof accrued." *See Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 23 O.O.3d 346, 433 N.E.2d 147, paragraph one of the syllabus; and *NCR Corp. v. U.S. Mineral Products Co.* (1995), 72 Ohio St.3d 269, 271, 649 N.E.2d 175, 176-177, citing *Sun Refining & Marketing Co. v. Crosby Valve & Gage Co.* (1994), 68 Ohio St.3d 397, 627 N.E.2d 552.

The court of appeals concluded that appellees' negligence claims against Jackson accrued after appellees took possession of the residence in 1992 and discovered the latent damage to the real property. Therefore, the court of

appeals held that because appellees filed their lawsuit in 1993, the suit was brought "well within the four-year statute of limitations."

Appellees agree with the conclusions reached by the court of appeals and propose that negligence claims predicated on injury or damage to real property accrue "*when the individual plaintiff* suffers an injury, not some other individual." (Emphasis sic.) Jackson, on the other hand, suggests that it is the injury or damage to the real property itself that is the defining event that triggers the running of the statute of limitations. In this regard, Jackson asserts that, because known water problems existed on the property as early as 1985, and because the lawsuit was not commenced by appellees until 1993, the four-year statute of limitations in R.C. 2305.09(D) acts as a bar to appellees' claims.

Generally, a cause of action accrues at the time the wrongful act is committed. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87, 4 OBR 335, 337, 447 N.E.2d 727, 730; and *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581, 582, citing *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 1 OBR 117, 437 N.E.2d 1194. However, in situations where the wrongful act does not immediately result in injury or damage, strict application of the general rule can lead to an unjust result. Thus, to provide for a more equitable solution, this court, in accordance with its judicial authority, see *O'Stricker v. Jim Walter Corp.*, paragraph one of the syllabus,1 has applied a discovery rule in numerous

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1 In *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, paragraph one of the syllabus, we held, "Absent legislative definition, it is left to the judiciary to

situations. See, also, *Collins v. Sotka*, 81 Ohio St.3d at 510, 692 N.E.2d at 584 (discovery rule adopted "to prevent inequities that occur when a statute of limitations is rigidly followed").

In *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St.2d 198, 61 O.O.2d 430, 290 N.E.2d 916, this court established a discovery rule for medical malpractice claims. See, also, *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 5 OBR 247, 449 N.E.2d 438; *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337; *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204; and *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93. Additionally, in *Skidmore & Hall v. Rottman* (1983), 5 Ohio St.3d 210, 5 OBR 453, 450 N.E.2d 684; *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941; and *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, a discovery rule has been applied to legal malpractice actions.

Further, this court has adopted a discovery rule in several other situations. See, e.g., *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101 (wrongful adoption); *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206 (fraud or conversion); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 609 N.E.2d 140 (DES-related claims); *Browning v. Burt* (1993), 66 Ohio St.3d 544, 613 N.E.2d 993 (negligent credentialing of a physician); *O'Stricker v. Jim Walter Corp.* (exposure to asbestos); *Liddell v. SCA Services of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 635 N.E.2d 1233 (exposure to toxic chlorine gas); *Ault*

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determine when a cause 'arose' for purposes of statutes of limitations."

v. Jasko (1994), 70 Ohio St.3d 114, 637 N.E.2d 870 (sexual abuse of children); and *Collins v. Sotka* (wrongful death).

In *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 23 O.O.3d 346, 433 N.E.2d 147, paragraph two of the syllabus, this court held that "[w]hen negligence does not immediately result in damages, a cause of action for damages arising from negligent construction does not accrue until actual injury or damage ensues." In *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 198, 551 N.E.2d 938, 943, overruled on other grounds in *Brennaman v. R.M.I. Co*[2]. (1994), 70 Ohio St.3d 460, 639 N.E.2d 425, the court stated that "for purposes of the four-year statute of limitations set forth in R.C. 305.09(D), * * * [t]he *Velotta* holding is not a 'discovery rule.' " The court stated further that "construction cases deal with the delayed occurrence of damages, not with the 'discovery' of injury. The *Velotta* decision is concerned solely with accrual of a cause of action for purposes of a statute of limitations, not with discovery of injury or damages which have already occurred." *Id.*

However, the above holdings in *Sedar v. Knowlton Constr. Co.* have been subsequently overruled by this court. In *NCR Corp. v. U.S. Mineral Products Co.*, this court determined that R.C. 2305.09(D) applies to situations where a party is

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2 In *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425, paragraph two of the syllabus, we specifically overruled *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 551 N.E.2d 938, and held that "R.C. 2305.131, a statute of repose, violates the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution, and is, thus, unconstitutional."

seeking recovery for injury or damage to real property and that a "discovery rule is appropriate for accrual of such a cause of action." *Id.*, 72 Ohio St.3d at 271, 649 N.E.2d at 176-177. Additionally, the court noted that a discovery rule has been applied in medical malpractice cases and that "the underlying rationale also fits with latent property-damage actions." *Id.*, 72 Ohio St.3d at 271, 649 N.E.2d at 177. Further, a "discovery rule is invoked in situations where the injury complained of may not manifest itself immediately and, therefore, fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations." *Id.*

As in *NCR Corp. v. U.S. Mineral Products Co.*, we believe that a discovery rule is applicable here. In reaching this conclusion, we are mindful of the underlying rationale for statutes of limitations,3 and we have also considered the interests and equities involved, we reaffirm that tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D). In addition, we hold that a negligence action against a developer-vendor of real property for damage to the property accrues and the four-year statute of limitations of R.C. 2305.09(D) commences to run when it is first discovered, or

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3 In *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d at 88, 4 OBR at 339, 447 N.E.2d at 731, this court noted that "[t]he rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases."

through the exercise of reasonable diligence it should have been discovered, that there is damage to the property.

Here, from the time the Listons moved into the home in 1985, they were aware that standing water existed on the property and that the land did not drain properly. Thus, since the damage occurred at least as early as 1985, the time of the initial discovery by a purchaser that a problem existed regarding the property, appellees' negligence claims, including their claim that Jackson's negligence created a nuisance thereon, are time-barred. The initial discovery of the problem occurred more than four years before appellees commenced their lawsuit.

Appellees contend that to deny them the right to pursue their negligence claims against Jackson would violate Section 16, Article I of the Ohio Constitution, which sets forth that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." However, under the particular facts of this case, we disagree with appellees' contention. Here, a drainage problem allegedly caused by Jackson was known to the Listons before the sale to appellees. If appellees had been fully informed of the problems they most likely would not have purchased the home or they might have negotiated a price that reflected the problems. Of course, if the Listons had not been aware of the problems associated with the property, and appellees thereafter purchased the home, appellees' negligence claims against Jackson would not have accrued, in accordance with R.C. 2305.09(D), until appellees actually discovered, or through the exercise of reasonable diligence should have discovered,

the damage to the property. However, that is not what occurred here.

Accordingly, summary judgment was properly entered by the trial court in favor of Jackson. Therefore, the judgment of the court of appeals is reversed.

Judgement reversed.

MOYER, C.J., RESNICK, PFEIFER AND WALSH, JJ., concur.

LUNDBERG STRATTON, J., concurs in judgment only.

F.E. SWEENEY, J., dissents and would affirm the judgment of the court of appeals.

JAMES E. WALSH, J., of the Twelfth Appellate District, sitting for COOK, J.

THE SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

1999 Term

Dr. Frederick D. Harris, et al., Apellees,	:	Case No. 98-1338
		RECONSIDERATION ENTRY
v.	:	
Elain Liston et al.	:	
[Jackson Road Company, Appellant.]	:	(Cuyahoga County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is , denied.

(Court of Appeals No. 7224)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice